

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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*Ex parte* WAYNE CLEMENT SIGL

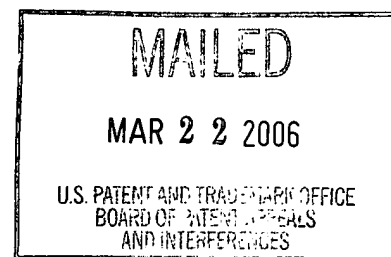
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Appeal No. 2006-0041  
Application No. 10/037,377

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ON BRIEF

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Before McQUADE, CRAWFORD, and TIMM, *Administrative Patent Judges*.  
TIMM, *Administrative Patent Judge*.

***DECISION ON APPEAL***

This appeal involves claims 1, 5, 8-11, 13-15, 19, and 22-25. Claims 4, 12, 18, and 26, the only other claims pending in this application, have been withdrawn from consideration by the Examiner. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 134.

### ***INTRODUCTION***

The claims are directed to an absorbent article such as a labial pad. The article includes a liquid-impermeable baffle, an absorbent, and a retainer flap extending over the baffle such that the baffle is between the retainer flap and the absorbent. The absorbent article has both a body-facing surface, and a body-opposing surface, and is shaped to fit within a female user's vestibule.

Claim 15 illustrates the invention on appeal:

15. An absorbent article, comprising:

(a) a liquid-impermeable baffle;

(b) an absorbent, said absorbent article being configured for disposition primarily within a vestibule of a female wearer, said absorbent article having a central longitudinal axis, an outer edge defining a first outer perimeter of said absorbent article, a body-faceable surface, and a surface opposed to the body-faceable surface; and

(c) a retainer flap extending over said baffle and covering greater than about 40 percent of the surface opposed to the body-faceable surface such that said baffle is between said retainer flap and said absorbent, said retainer flap having a second outer perimeter, the second outer perimeter having first and second portions, the first portion being disposed proximate the first outer perimeter of said absorbent article, and being generally attached in said absorbent article at or adjacent the first outer perimeter, the second portion of the outer perimeter of said retainer flap extending across an outer surface of said baffle whereby said retainer flap covers a portion of said baffle, the second portion of the second outer perimeter of said retainer flap being displaceable from said baffle thereby to define a first cavity between said retainer flap and said baffle.

The Examiner rejects the claims under both 35 U.S.C. § 112 ¶ 2 and 35 U.S.C. § 103(a).

With regard to the rejection under 35 U.S.C. § 103(a), the Examiner relies on the following prior art references to show unpatentability:

Srinivasan et al. (Srinivasan)	US 3,973,567	August 10, 1976
Lenaghan	US 4,405,326	September 20, 1983
Lassen et al. (Lassen)	US 4,631,062	December 23, 1986
Houghton et al. (Houghton)	US 5,706,950	January 13, 1998
Richardson	US 6,623,466	September 23, 2003 (eff. filed Oct. 23, 1997)
Molnlycke	WO 88/06008	August 25, 1988

The rejections as presented by the Examiner are as follows:

- A. Claims 1, and 13-15 rejected under 35 U.S.C. § 112, ¶ 2, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention;
- B. Claims 1, 5, 11, 13, 15, 19 and 25 rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Molnlycke and Lassen;
- C. Claims 8-10 and 22-24 rejected under 35 U.S.C. § 103(a) as being unpatentable over Molnlycke and Lassen, and in further combination with Lenaghan and Srinivasan; and
- D. Claim 14 rejected under 35 U.S.C. § 103(a) as being unpatentable over Molnlycke and Lassen, and in combination with Houghton and Richardson.

### **OPINION**

We reverse with respect to the rejection under 35 U.S.C. § 112, ¶ 2, but affirm with respect to the rejections under 35 U.S.C. § 103(a). Our reasons follow.

#### **A. Rejection under 35 U.S.C. 112, ¶ 2**

The rejection of claims 1 and 13-15 as indefinite under 35 U.S.C. § 112, ¶ 2 is based on the Examiner's determination that, "the range of percentages of the coverage of the surface opposed to the body-faceable surface by the retainer flap is unclear." (Answer, Pg. 3). This lack of clarity is due to what the Examiner perceives as an inconsistency between two limitations found in the independent claims, i.e. the limitation "covering greater than about 40 percent" and the limitation "covers a portion." (*C.f.* Claim 15, lines 8-9 and 16-17). According to the Examiner:

[I]f the flap covers 100% of the surface as set forth on lines 8-9 than [sic; then] the flap covers more than just a portion of the baffle as set forth on lines 16-17. Note also claims 19, 22, last two lines, and 25 which set forth the range being less than 100%. In other words, it is unclear whether 100% of the surface opposed to the body faceable surface is covered by the retainer flap or only a portion thereof.

(Answer, Pg. 3).

According to 35 U.S.C. § 112, ¶ 2, "[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." The primary purpose of the definiteness requirement is to ensure that the claims are written in such a way that they give notice

to the public the extent of the legal protection afforded by the patent, so that interested members of the public, e.g., competitors of the patent owner, can determine whether or not they infringe. *All Dental Prodx LLC v. Advantage Dental Products Inc.*, 309 F.3d 774, 780, 64 USPQ2d 1945, 1949 (Fed. Cir. 2002), citing *Warner-Jenkinson*, 520 U.S. at 28-29. (Fed. Cir. 1997). The standard is one of reasonableness: The claims must set out and circumscribe a particular area with a reasonable degree of precision and particularity. *In re Moore*, 439 F.2d 1232, 1235, 169 USPQ 236, 239 (Fed. Cir. 1971); *see In re Warmerdam*, 33 F.3d 1354, 1361, 31 USPQ 2d 1754, 1761 (Fed. Cir. 1994) (The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope.)

Claim 15 discloses an absorbent article that comprises a baffle, an absorbent, and a retainer flap. Lines 8-9 recite: “a retainer flap extending over said baffle and covering, greater than about 40 percent of the surface.” Lines 16-17 recite: “whereby said retainer flap covers a portion of said baffle.”

We determine that the Examiner has misinterpreted the claim. According to the Examiner’s interpretation, “greater than about 40 percent” means “greater than from 40 percent to 100 percent.” However, “greater than about 40 percent” means just that: “greater than about 40 percent”. There is no limitation placed on the upper endpoint of the range.

Also, we determine that the limitation, “greater than 40 percent” can be interpreted consistently with “portion” in the context of the claim. Subsequent language in a claim can further limit an earlier presented limitation. It is entirely possible for a retainer flap to extend greater than about 40 percent of the surface and also cover a portion of the baffle. One of ordinary skill in the art would be reasonably apprised of range of coverage afforded by these two limitations.

Therefore, we conclude that the examiner has failed to establish indefiniteness within the meaning of 35 U.S.C. § 112, ¶ 2.

**B. Rejections under 35 U.S.C. § 103(a)**

The examiner maintained three grounds of rejection, as discussed below:

**1. Rejection of claims 1, 5, 11, 13, 15, 19 and 25 over Molnlycke in combination with Lassen.**

The Examiner rejects claims 1, 5, 11, 13, 15, 19 and 25 over Molnlycke in combination with Lassen. Because Appellant does not argue any claim apart from the others, we select a single claim, claim 15, to represent the issues on appeal.

The Examiner rejected the claims because, “to combine a sanitary napkin, such as that taught by [Lassen], which is configured for disposition primarily within the vestibule of a female wearer as well as packaged in a separate receptacle[, with] the sheet 4 of [Molnlycke would have been] obvious to one of ordinary skill in the art in view of the recognition that such a configured sanitary napkin [was] conventional and such

combination would obviate the need for a separate receptacle, i.e. cost and use efficient, and the desire of Molnlycke to ... combine the sheet 4 with any conventional sanitary napkin to obviate the need for a separate package." (Answer, Pg. 6).

Appellant has failed to persuade us that the Examiner committed reversible error with regard to the rejection over Molnlycke and Lassen for the following reasons.

The claim 15 is directed to an absorbent article such as a labial pad that fits within a vestibule of a female wearer. Lassen teaches such a pad (Col. 9, lines 60-65). As required by claim 15, the pad of Lassen has a baffle that functions as a fluid-impermeable shield, and an absorbent within the baffle that is shaped to fit within a vestibule of a female. (Fig. 1; Col. 13, lines 1-35; and Col. 20, lines 55-60). However, Lassen fails to teach a retainer flap attached to the absorbent article as further required by claim 15. Molnlycke teaches a disposable article that includes an absorbent body, liquid impermeable layer, and a sheet that is attached to the absorbent body and the liquid impermeable layer. (Pg. 1, lines 1-5 and Pg. 2, lines 4-11 and 30-37). The sheet may be of different sizes, and can be folded over the absorbent body to serve as a package. (Pg. 2, lines 35-37, and Pg. 6, lines 5-10). Therefore, the sheet allows the absorbent article to be carried in a hygienic manner after use, without the need of a separate bag. (Abstract, last sentence).

Appellant argues that "the cited references cannot be combined as suggested by the Examiner to render the claimed invention obvious." (Brief, Pg. 6). Is so arguing,

Appellant focuses on the specific embodiments of Molnlycke that include a diaper as shown in Figures 1 and 2 and an incontinence protector as shown in Figures 3-5. The Appellant then concludes that neither the embodiment of Figures 1-2 nor the embodiment of Figures 3-5 of Molnlycke can form the basis of the obviousness rejection. (Brief, Pg. 6-7).

First, we disagree with Appellant's characterization of the Molnlycke embodiments of Figures 1-2 and 3-5. These embodiments are not, contrary to the argument of Appellant, limited to teaching an elastic sheet 4 (the claimed retainer flap) on the body faceable surface of an absorbent article. While Figure 1 depicts sheet 4 as being on the same side as the body-faceable surface of the illustrated diaper, Molnlycke also discloses pulling the end of the diaper inside-out, like pulling a pocket out of trousers, so that "[t]he sheet 4 will thus be situated on the same side of the absorbent body as the outer layer 3" before the diaper is used (Molnlycke, Pg. 3, lines 6-10). Therefore, in the embodiment of Figures 1 and 2, Molnlycke describes an absorbent article with a retainer flap (sheet 4) extending over said baffle (outer layer 3) such that the retainer flap (sheet 4) covers a portion of the surface opposed to the body-faceable surface as claim 15 requires. The embodiment of Figures 3-5 also places the sheet 4 (retainer flap) on the outer surface of the incontinence protector. Furthermore, the Brief acknowledges that the sheet 4 is in the claimed position by

explaining that Figures 3-5 illustrate an incontinence protector for men “having a sheet 4 on the outer surface thereof.” (Brief, Pg. 7.)

Second, Appellant’s arguments too narrowly focus on the specific embodiments of Molnlycke while ignoring other disclosures within the reference. It is well settled that a prior art reference is relevant for all that it teaches to those of ordinary skill in the art. *In re Fritch*, 972 F.2d 1260, 1264, 23 USPQ2d 1780, 1782 (Fed. Cir. 1992). *See also Merck & Co v. Biocraft Laboratories*, 874 F.2d 804, 807, 10 USPQ2d 1843, 1847 (Fed. Cir. 1989) (A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including non-preferred embodiments); *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568, 1 USPQ2d 1593, 1597, cert. denied, 107 S.Ct. 2187 (Fed. Cir. 1987) (In determining obviousness, a prior patent must be considered in its entirety). Molnlycke discloses that “the sheet 4 simply constitutes an addition to conventional absorbent articles, such as diapers and sanitary towels.” (Molnlycke, Pg. 3, lines 25-27). Lassen describes a conventional absorbent article. Lassen shows that the pad is kept in a separate package (Figs. 11-13), just the type of packaging Molnlycke seeks to replace. The suggestion to include a retainer flap on the absorbent article of Lassen flows from the express disclosures of the references. The fact that Molnlycke further discusses specific embodiments of absorbent articles does not negate the broader disclosure within the reference.

Nor can we agree that Molnlycke teaches away from a flap covering greater than about 40 percent of the surface as argued by Appellant (Brief, Pg. 6). While the Appellant correctly notes that Figures 1 and 2 depict a narrow retainer flap, other disclosures within Molnlycke indicate that the extent of the flap varies with the design of the particular absorbent article. For example, Molnlycke teaches that the configuration and dimensions of the sheet 4 can be modified (Molnlycke, Pg. 6, lines 5-8). It follows that the determination of the workable or optimal extent of the retainer flap is a matter within the capabilities of the ordinary artisan. In such a situation, it falls on Appellant to show an unexpected result for the particular claimed extent. *See In re Huang*, 100 F.3d 135,139, 40 USPQ2d 1685, 1688 (Fed. Cir. 1996) and *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

We conclude that the Examiner has established a prima facie case of obviousness with respect to the subject matter of claims 1, 5, 11, 13, 15, 19, and 25 which has not been sufficiently rebutted by Appellant.

**2. Rejection of claims 8-10 and 22-24 over Molnlycke and Lassen, and further in combination of Lenaghan and Srinivasan.**

To reject claims 8-10 and 22-24, the Examiner added Lenaghan and Srinivasan as further evidence of obviousness. Appellant's argument again focuses on the combination of Molnlycke and Lassen as it applies to claims 1 and 15. There being no new argument over and above what we have already addressed, we conclude that the

Examiner has established a prima facie case of obviousness with respect to the subject matter of claims 8-10 and 22-24 which has not been sufficiently rebutted by Appellant.

**3. Rejection of Claim 14 over Molnlycke and Lassen, and further in combination of Houghton and Richardson.**

To reject claim 14, the Examiner added Houghton and Richardson as further evidence of obviousness. Again, Appellant presents no new argument over and above what we have already addressed. We conclude that the Examiner has established a prima facie case of obviousness with respect to the subject matter of claim 14 which has not been sufficiently rebutted by Appellant.

Based upon a review of the totality of the evidence of record with due consideration of the arguments advanced by the Appellant, we conclude that a preponderance of the evidence supports a legal conclusion of obviousness within the meaning of 35 U.S.C. § 103(a). We therefore affirm the decision of the Examiner to reject the claims as obvious.

**CONCLUSION**

In summary, while we do not sustain the rejection under 35 U.S.C. § 112, ¶ 2, we affirm the decision of the Examiner to reject the claims on the grounds of obviousness.

**AFFIRMED**

**MURRIEL E. CRAWFORD**  
Administrative Patent Judge

  
CATHERINE TIMM  
Administrative Patent Judge

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